IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.150 of 1992

Sarojani Chandrakant Tirhekar Appellant

Vs.

1. Smt. Yamunabai Sopan Zol
2. Ganpat Sopan Zol
3. Shivaji Sopan Zol
4. Arvind Sopan Zol
5. Shankar Sopan Zol Respondents

Mr. A.A. Kumbhakoni for appellant.
Mr. R.S. Kate for respondents.

CORAM: B.H.MARLAPALLE,J.

Reserved on : 28th March, 2007
Pronounced on : 4th April, 2007

JUDGMENT:

1. This Second Appeal arises from the decree passed by the learned Civil Judge, Junior Division at Barshi in Regular Civil Suit No.365 of 1981 for partition and perpetual injunction and duly confirmed in Regular Civil Appeal No.625 of 1987 by the learned 3rd Addl. District Judge at Solapur. Though while admitting the appeal no substantial questions of law were framed, subsequently by written submissions placed on record sometimes in June 2000 the following substantial questions of law have been framed by the appellant - original defendant :

(a) Whether unless a Certificate under Section 32-M of the Bombay Tenancy and Agricultural Lands Act is issued, the title does not vest in the tenant-purchaser, as held by the courts below?

(b) Whether Sopan could have executed a will before obtaining the 32M certificate in respect of the entire tenanted property?

(c) Whether the suit property obtained by the deceased Sopan in 1950 or thereabout as a tenant, of which he later on became a statutory purchaser by virtue of provisions of the Bombay Tenancy and Agricultural Lands Act, is a self-acquired property of the deceased Sopan or a joint family property?

(d) Whether by way of a registered will dated 11th February, 1980, which is held as proved by the Courts below, the defendant has acquired ownership of the entire suit land to the exclusion of the plaintiffs?

2. Rajaram Zol, a resident of Pangari had three sons viz. Ambadas, Shankar and Sopan. Sopan Zol was cultivating the suit agricultural land owned by Shri Ramchandra Kale and the said land admeasured 8 H. 35 Rs. and located in Gat No.357. He came in possession of the said land as a tenant sometimes in the year 1951-52 and was in cultivation as on 1/4/1957. Sopan, therefore, became a protected tenant and consequently a statutory purchaser of the said land under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. He did not remit the purchase price and, therefore, ownership certificate under Section 32-M of the said Act was not issued in his favour. Sopan's wife and four sons filed Regular Civil Suit No.365 of 1981 against Sopan's only daughter for perpetual injunction and for partition of the suit property. The plaintiffs claimed that they were entitled for 35/36th share in the suit land. The defendant filed her Written Statement at Exhibit 79 and stated that her father Sopan had executed a Will on 11/2/1980 and the same was registered at Exh. 223. As per the said Will Sopan had bequeathed the entire suit property to the defendant as she had looked after him, paid for his

medical treatment, acted as his power of attorney to fight the Court cases to restore possession of the suit land in favour of Sopan and lastly on account of love and affection. She further claimed that the suit land was self-acquired property of Sopan and, therefore, he had the legal right to bequeath it in its entirety as per his choice. She further claimed that the plaintiffs being the wife and sons of Sopan had no right to ask for any share in the self acquired suit property. The plaintiffs amended the plaint and challenged the legality and validity of the Will of Sopan on various grounds. On behalf of the plaintiffs, plaintiff no.1 Yamuna (PW 1), plaintiff no.3 Shivaji (PW 2), Arjun Godse (PW 3), Ramchandra Kadam (PW 4) and Vitthal Mase (PW 5) were examined. The defendant examined herself.

3. Admittedly Sopan Zol died on 29/5/1982 and the defendant was born on 1/6/1949 and was married in the year 1969 to Chandrakant Tirhekar, a resident of Barshi. She had completed her Diploma in Education. She is the third child amongst the five children born to plaintiff no.1 and Sopan. Plaintiff no.2 Ganpat and plaintiff no.3 Shivaji are the elder brothers of defendant whereas plaintiff no.4 Arvind and plaintiff

no.5 Shankar are her younger brothers. She was residing with her husband upto 1972 and begot two children. It appears that her husband contracted second marriage and, therefore, she instituted proceedings for maintenance under Section 125 of Cr.P.C. and initially an amount of Rs.60 per month was granted to her by way of maintenance and it was subsequently revised to Rs.90 per month in M.A. No.27 of 1979 and thereafter it was revised to Rs.275/- per month. It is also admitted that plaintiff no.3 Shivaji was staying at Barshi since 1965 and had a job. In addition it is also not in dispute that Sopan had lost possession over the suit land in the year 1961 and he had initiated proceedings (Tenancy Case No.116 of 1975) for restoration of the same. Due to his old age he was not able to attend to these proceedings and, therefore, he had appointed the defendant as his power of attorney (Exh. 187 dated 10/4/1975) to prosecute the case and on the basis of the same she obtained possession of the suit property on 29/10/1976 as Sopan's power of attorney. The other plaintiffs were farm labourers or were cultivating the suit land. On the date Sopan executed Will in favour of the defendant (11/2/1980) plaintiff no.2 -

Ganpat was about 35 years of age (born in 1945) i.e. four years elder to the defendant, plaintiff no.4 Arvind was about 29 years of age, and plaintiff no.5 Shankar about 24 years of age. It was the case of the plaintiffs that plaintiff nos.2 and 5 were cultivating the suit land and plaintiff no.4 was working as a farm labourer whereas plaintiff no.3 had a job at Barshi and from his earnings he was also contributing for investment in cultivating the suit land. In short the plaintiffs had contended that the suit land was a family property though it had come to the ownership of their father by operation of the Tenancy Act and, therefore, their father could not bequeath the said property as per his Will in favour of the defendant. They contended that at the most the defendant could have 1/6th share along with the five plaintiffs on the demise of their father Sopan.

4. The trial Court on assessment of the evidence held that :

(a) The plaintiffs proved their possession and occupation of the suit land.

(b) The suit property could not be

exclusively owned by Sopan Zol by operation of law.

(c) The defendant had proved the Will dated 11/2/1980 and by the said Will the suit property was bequeathed to the defendant.

(d) The defendant could not prove that she had become exclusive owner of the suit property by the said Will after the death of her father Sopan.

(e) The plaintiffs are entitled to get 1/6th share each in the suit property.

5. Mr. Kumbhakoni, the learned counsel appearing for the appellant - defendant submitted that the presumptions drawn by both the Courts below that the suit property was a joint family property because it was a joint family of Sopan Zol is an error in law apparent on the face of the record and such a presumption cannot be drawn. On the other hand it must be proved by cogent evidence that by the acts of the parties and more particularly the owner of the property that it was the suit property so thrown in

the common holding by his own free will and it was shared by all the members of the family. Self-acquired property cannot be part of the joint family property unless it is admitted specifically or proved otherwise that at the time of such acquisition, (a) there existed a nucleus in the form of ancestral or joint family property, (b) such a nucleus was so adequate that with it the property in issue could have been acquired and (c) the Hindu who so acquired the property was in possession of such a nucleus. And all these conditions are required to be proved conjunctively. In the absence of "common stock" there was no question of throwing a separate property into a non-existent "common stock" and the existence of a coparcenery is absolutely necessary before a coparcener can throw into the common stock his self acquired property. The doctrine of "throwing into common stock" a separate property by Hindu, inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcenery property and desires to blend his separate property with the coparcenery property. In order to prove holding of a separate property with the joint family property, it must be in the first place specifically pleaded and proved that there

existed or exists a joint family property which is commonly known as "common stock" or "hotch-potch". He further submitted that a Hindu owner of a separate property must voluntarily throw into common stock of an existing property, his separate property with the specific intention of obtaining his separate claim in such property. In support of these contentions the learned counsel relied upon the following decisions:

(1) G. Narayana Raju v. G. Chamaraji **[AIR 1968 SC 1276]**

(2) Goli Eswariah v. Commissioner of Gift Tax, A.P. **[AIR 1970 SC 1722]**

(3) K.V. Narayanan v. K.V. Ranganadhan **[AIR 1976 SC 1715]**

(4) Lakkireddi Chinna Venkata Reddi v. Lakkireddi Lakshmama **[AIR 1963 SC 1601]**

(5) D.S. Lakshmaiah v. L. Balasubramanyam **[AIR 2003 SC 3800]**.

It was further contended that when Sopan had become

the statutory owner of the suit land, the ownership was not coparcenery and, therefore, it was a self acquired property of Sopan. By his voluntary acts, Sopan did not admit in common stock the suit land either by his actions voluntarily or by any other means and, therefore, he was free to bequeath the property as per his choice and he did so by his will dated 11/2/1980 executed in favour of the defendant. According to the learned counsel both the Courts below committed a patent illegality in holding that the suit property was a family property and, therefore, could not be willed by Sopan as per his choice.

6. In all the decisions relied upon by the plaintiffs the coparcenery or joint family property was either between the brothers or cousins i.e. different branches. The term "joint family property" would be in use in common parlance when the property dispute is between the brothers inter se along with the parents. In the instant case the sole issue that is required to be considered is whether the suit land had become a family property on the day Sopan had executed the will and both the Courts below have answered this issue in the affirmative. As per the

learned counsel for the defendant this finding is not supported from the evidence.

7. As per the Hindu Law there is no dispute that the male issues do not acquire by birth alone any interest in the separate property or self acquired property of a male Hindu whether the property is immovable or movable. A male Hindu may acquire and possess individual or separate property even where he is member of joint undivided family, for it is not the law that the Hindu is incapable (while in a State or Union) of holding any property of his own apart from that of the family property. Hindu Law recognises separate property of individual members of a joint family as well as of separated members. A Hindu may make a gift of his entire property to a stranger or even disinherit by will his sons and other heirs. The expression "separate property" is different from the expression "self acquired property". The term "separate property" is used to distinguish the individual property of a male Hindu from the joint property of the family or rather his interest in the joint family property. A separate property would, therefore, include property howsoever acquired so long as it is not joint family property

for one reason or another. Thus the property acquired by a male Hindu by inheritance or gift as well as the property acquired by his labour or exertions is a separate property. Self-acquired property, on the other hand, means a self-acquisition properly so called. Thus the property acquired by a person by his own labour or exertions is self-acquired property, but that acquired, say, by inheritance is not. Hence self-acquired property is only one of the forms or species of separate property. In the case of joint family with parents and children and without any inheritance of ancestral property, it is possible that the father and other members of the family would treat such property acquired by the father as a family property by their own actions like cultivation etc. and if in law it has become a family property, it cannot be willed and disposed by the father as per his choice.

8. In the instant case admittedly Sopan did not have any other agricultural land except the suit land and he lost his possession over the same in the year 1961 and was put in possession on 29/10/1976 as noted earlier. It is thus necessary to examine whether the suit agricultural land had become a family property

from November 1976. Date of the Will is 11/2/1980 and the burden to prove this was substantially on the plaintiffs. In that regard let us examine the evidence adduced by the parties.

9. PW 1 Yamuna stated in her examination-in-chief that her husband was spending the amount for cultivation of the land and this amount was earned from selling the agricultural goods so produced. Plaintiff no.3 was working in a cloth shop and was spending amount from this shop in the cultivation of the agricultural lands and was also paying for the household expenses. She further stated that her daughter (defendant) was married about 18 to 20 years back and she was residing separately since her marriage. All the plaintiffs were looking after the suit land along with Sopan and the defendant was never involved in the cultivation of the suit land. In her cross-examination she admitted that the residential house was owned by her father-in-law and she denied that she was working as a cook in a boarding at Barshi and was residing in Male Galli or Khade building at Barshi. She further admitted that Plaintiff no.3 Shivaji was residing in Raut Galli at Barshi from the time he had a job at Barshi and other

sons were residing at Pangari. She also stated that the price amount was paid by her sons as well as the defendant but complete amount was not paid. PW 2 Shivaji in his examination-in-chief stated that he, his father and sister had submitted a joint application to the Bank of India for loan so as to obtain loan for cultivation of land and to buy bullocks etc. A promissory note was signed on 28/7/1978 and agreement was also executed on the same day by all the three borrowers jointly. Documents are at Exhibits 68/5 to 68/44. Bullocks were purchased in the Bazar at Barshi and receipt at Exhibit 98 was brought on record and it was singed by him. He further reiterated that the plaintiffs were jointly spending the amounts for cultivation of the land and the defendant was residing at Barshi with her husband after her marriage in 1969 in the house of one Kisa. Apart from the maintenance amount she was receiving, the defendant had no other source of income and she never contributed to the expenditure required for cultivation of the suit land. The loan borrowed from the Bank was jointly repaid and the defendant never resided with the father. The defendant never physically cultivated the suit land nor she did so through her servants. He further

stated that the land was being cultivated by plaintiff nos.1 and 2 and his father. In his cross-examination he admitted that the suit land was restored in the year 1976 and though he was present at the time of taking over the possession, he did not sign on the possession receipt. He also admitted that the defendant obtained the possession as a power of attorney holder of his father. He also stated in his cross-examination that in the year 1981-82 he had purchased bullocks from a private party and obtained receipt in Pangari village. PW 3 Arjun Godse, a neighbouring land holder stated before the Court that the plaintiffs were in possession of the suit land and Sopan along with the plaintiffs was cultivating the suit land during his life time. Plaintiffs were jointly staying with Sopan at Pangari. Thus the evidence of PW 1 was supported by PW 4 and PW 5.

. The defendant in her depositions before the Court stated that after the power of attorney at Exhibit 187 was executed in her favour by Sopan, he was staying with her at Barshi and he met with an accident in 1978. She had got him admitted in the hospital and spent for his treatment. Her father had executed Will dated 11/2/1980 in her favour (Exh.

223) and it was signed by two witnesses in her presence viz. Maruti Mahadu More and Solwad. Her father was present when the will was signed by the witnesses and he was in sound health at that time. She reiterated that she was in possession of the suit land since the death of her father and till the receipt of the injunction order. She also relied upon the Mutation entry no.499 at Exhibit 104/6. She also admitted that at Exhibit 224 names of the plaintiffs were also entered in other rights column and she had preferred an appeal against the same. She claimed that she had become the owner of the suit land and the plaintiffs did not have any concern with the same. She admitted in her cross-examination that herself, her father and plaintiff no.3 had filed jointly an application for Bank loan in 1978 (Exh.68/1/) and loan was sanctioned. She also admitted that it was signed by plaintiff no.3 as well (Exhibit 236). She also admitted that the deed of hypothecation was also signed by all the three borrowers. She identified the signature at Exh. nos.237, 238, 239 to 245. She further stated that in the year 1979-80 her father was in possession of the suit land and further stated that after the demise of her father she was cultivating the suit land through

Maruti More, Vithal Jadhav, Suryabhan Kadam, Gaibinath Jagdale and Dyanoba Jagadale, but had no written document to support the same. She further stated that the yield from the agricultural land was sold by her. She admitted that ownership certificate under Section 32M of the Bombay Tenancy Act was not received in respect of the suit land.

. In her depositions in Criminal Application No.77 of 1979 she had stated as under :

> "Since 1975 I look after the litigation of my father on the strength of power of attorney. My two elder brothers are illiterate and two small (younger) brothers are minor. I am in fact not the owner of the land Gat No. 357. The yield from the land Gat No.357 is not taken by me. It is given to my father and brothers etc."

. Whereas Devidas Jagadale who was the second witness examined in Criminal Misc. Application No.77 of 1979 filed by the defendant stated before the Court on oath as under:

> "I know Sopan Rajaram Zol. He has four sons and one daughter. My land is adjacent to the south of the land of Sopan Rajaram Zol. Ganpu and Shanker the sons of Sopan Rajaram Zol cultivate the land. Sopan Rajaram Zol has

> bullocks and other husbandry. Sopan Rajaram Zol cultivates the land since 10 to 15 years. The yield from the land are enjoyed by Sopan and his sons..."

10. The evidence so adduced before the Court and as rightly held by the trial Court as well as the Appellate Court, went to prove that the suit land was being cultivated as a family property with Sopan as the head of the family and the plaintiffs as the members of the family. The defendant was married and was staying with her two children at Barshi. Even if it is admitted that the plaintiff - Shivaji was staying at Barshi as he was working there, it is clear that he was contributing for the family requirements as well as for cultivation of the land at Pangari and loan was obtained from the Bank in three joint names i.e. Sopan, Plaintiff No.3 and the defendant. Plaintiff no.3 is elder to the defendant and he also stated before the Court while in the witness box that he had purchased bullocks from his funds for cultivation of the suit land. The inescapable conclusion that comes from this evidence is that Sopan by his own acts had accepted the suit land as the family property with the plaintiffs as other family members and both the Courts below were right in holding that the family property could not

be bequeathed by Sopan by the Will at Exhibit 223 in favour of the defendant in its entirety. The Will having been held to be valid, the Courts have rightly held that the same could be accepted only in respect of Sopan's share on the date of the Will i.e. 1/6th share. The contentions of the learned counsel for the defendant that the suit land was the self-acquired property of Sopan and it did not become a family property at any time cannot be accepted. On the date of execution of the Will, the suit land had become a family property with Sopan as the head and his wife and sons as other members of the joint family. Though plaintiff no.3 was staying separately at Barshi, the evidence on record has proved that he was financially contributing to the family requirements as well as towards the expenditure needed for the cultivation of the suit land.

11. The learned counsel for the defendant was right in his submission that the non-issuance of purchase certificate under Section 32M of the Bomaby Tenancy Act does not come in the way of the title of tenant purchaser and the finding otherwise recorded by the Courts below does not in any way entitle the defendant to have more than Sopan's share in the suit

land. Both the Courts below have accepted the Will as valid Will but have held that it could be accepted only in respect of Sopan's share and he could not have bequeathed the shares of the plaintiffs. Issue no.(b) is thus answered. The defendant could not be held to have acquired the ownership of the entire suit land to the exclusion of the plaintiffs as on 11/2/1980 as the suit land had become a family property and it did not remain the exclusive property of Sopan so as to bequeath in its entirety and to the exclusion of the plaintiffs as on 11/2/1980.

12. In the premises this Second Appeal fails and the same is hereby dismissed.

(B.H